No. 4088

In the

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. MAXWELL, *Plaintiff in Error,*

vs.

EVA L. RICKS, *Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF DEFENDANT IN ERROR

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MOTION TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT

The defendant in error, by her counsel, respectfully moves the court for a dismissal of the writ of error, or, in the alternative, for an affirmance

of the judgment of the court below, on the grounds and for the reasons following:

1. No exceptions to any of the rulings of the court in the progress of the trial of the cause, upon any fact or upon any proposition of law, were taken or preserved by the plaintiff in error;

2. No bill of exceptions appears in the record, nor was any prepared or presented or filed incorporating therein any ruling of the court, excepted to or otherwise, in the progress of said trial;

3. The record shows no finding made by the court, except a general finding for the defendant;

4. No proper or any objection or exception to the judgment was filed or taken by plaintiff in error at the time of its entry or otherwise.

ARGUMENT ON THE MOTION

This is an action at law, the trial having been to the court under a written stipulation between the parties waiving a jury. Both sides fully presented their evidence, and at the close of the trial the contentions of the respective counsel were presented and argued to the court, after which the

court took the case under advisement, and about a month thereafter filed an opinion finding for the defendant. (Tr. Record, pp. 26-27.) No exceptions were taken to any ruling of the court, no declarations requested on any proposition of law, and no bill of exceptions appears in the record.

Section 649 of the Revised Statutes provides as follows:

"Sec. 649. (Issues of fact tried by the court.) Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

While Section 700 contains the following provisions:

"Sec. 700. (Cases tried by the circuit court without the intervention of a jury.) When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the

review may extend to the determination of the sufficiency of the facts found to support the judgment."

Compliance with the provisions of the sections quoted is essential in order to preserve to the party submitting a cause to a trial before a court, both as to law and fact, the benefit of a review or re-examination of questions of law in the appellate court.

The only finding made by the trial court in the instant case is a general finding incorporated in the judgment, and which performs the office of the verdict of a jury. In such case only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on pleadings.

Plaintiff in error, desiring a review of the law involved in the case, should have requested the trial court to make a special finding, which raises the legal propositions, or he should have presented to the court such propositions of law, and required a ruling on them.

It was held in *Kelly v. Ophir*, 169 Fed. Rep. 598, that an opinion of the trial judge analyzing the facts and applying the law is not a special finding of facts within Section 700.

While no exception of any kind was made to the court's general finding, yet had it been made it would not have operated to bring up to this court any question for review. In the absence of any special finding and of any exception taken to any ruling of the court during the trial, no appeal will lie.

This court is asked to review a question of law, one upon which the trial court did not pass and upon which it was not asked to pass. As this court, in actions of law, can only correct errors committed by the trial court, to which proper exceptions are taken, there is nothing presented in the record for this court's consideration.

The sections of the Revised Statutes referred to have been frequent subjects for consideration, discussion and interpretation by the federal appellate courts, and their meaning and effect are well settled.

Taft, Circuit Judge, speaking for the Circuit Court of Appeals, Sixth Circuit, in *Humphreys v. Third National Bank of Cincinnati*, 75 Fed. Rep. 852, thoroughly covers the grounds above enumerated in support of the motion made by defendant in error, in the following language:

"This practice in the federal courts of appeal differs from that in the state courts of this circuit where it is open to counsel on writ or error by exception to a general finding to raise the question in the appellate court of the sufficiency of the evidence as a matter of law to sustain such finding. We fear that this difference in the practice is not sufficiently well known to counsel, and we think that their attention should be especially directed to the very technical and severe rule of the federal appellate courts in this respect. When a party in the circuit court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits. A general finding in favor of the party is treated as a general verdict. A general verdict cannot be excepted to on the ground that there was no evidence to sustain it. Such a question must be raised by a request to the court to direct a verdict on the ground of the insufficiency of the evidence. If the views which the court takes of the law are deemed to be prejudicial to a party, he is required to except to the charge at the time

that it is delivered, indicating those parts of it to which he objects. Where a cause is submitted to the court, however, the court cannot, in the nature of things, charge itself, and therefore no opportunity is presented to the party objecting to the views which the court entertains of the law to take his exceptions, unless he procures special findings of fact to be made and special conclusions of law to be drawn therefrom. We regret that in a number of cases brought before us the submission of a law case to a court upon stipulation has proved a trap to counsel in this court, and we say what we have with the hope that it may direct the attention of those who shall bring cases here in the future to the fact that great care must be taken in the preparation of a case for error proceedings, when no jury intervenes."

Judge Wolverton, speaking for this court, in *Societe Nouvelle D'Armement v. Barnaby*, 246 Fed. Rep. 68, held to a like effect, and in the course of the opinion adopted the language of Justice Taft above quoted.

It would seem unnecessary to cite further authorities in support of the motion, but a few are herewith given:

Lloyd v. Williams, 137 U. S. 576; 34 L. Ed. 788.

Norris v. Jackson, 76 U. S. 125; 19 L. Ed. 608.

Press v. Davis, 54 Fed. Rep. 267.

National Bank of Commerce v. First National Bank, 61 Fed. Rep. 809.

City of Key West v. Baer, 66 Fed. Rep. 440.

Distilling, etc., Co. v. Gottschalk Co., 66 Fed. Rep. 609.

Wesson v. Saline Co., 73 Fed. Rep. 91.

Upon the fourth ground stated in the motion, namely, that no sufficient or any exception was taken to the judgment or to its entry, reference is made to the notation at the end of the judgment (Tr. Record, p. 27), which is as follows:

"Exceptions allowed.
EDWARD E. CUSHMAN,
Judge."

There is nothing to show that plaintiff in error, by his counsel, took or made or filed any exceptions to the judgment, counsels' only act at or before the time of its entry being shown by the other notation:

"Approved:
Carroll B. Graves,
Edwin H. Flick."

It is submitted that the mere informal and usual allowance of an exception so noted at the end of the judgment by the court does not amount to any substantive act upon the part of counsel making or claiming the same and forms no basis for the review of any error.

In *Kelly v. Ophir, etc., supra,* where the only exception, in the language of counsel, was "to the making and entry" of the judgment, it was held not to be sufficiently specific to present a question of law for determination by the appellate court; and in *Webb v. National Bank, etc.,* 146 Fed. Rep. 717, an exception "to each and all and every of said findings, conclusions and judgment," after a judgment had been rendered at the close of the trial, was futile, in the absence of any objection, exception or request for a declaration of law.

For each and all of the reasons stated, the writ of error should be dismissed, or, in the alternative, that the judgment of the court should be affirmed.

Respectfully submitted,

C. A. RIDDLE,
THEO. J. ROCHE,
Attorneys for Defendants in Error.

STATEMENT OF THE CASE

This is an action at law, the trial having been to the court under a written stipulation between the parties waiving a jury. (Tr. Record p. 26.)

On November 19, 1920, defendant in error executed and delivered to one J. R. Moore her two promissory notes in the sum of $5,000.00 each, together with a mortgage covering timber lands in the county of Del Norte, state of California, as security for the payment of said notes. This transaction occurred in and was completed by the parties thereto in the state of California. (Tr. Record p. 1.)

Subsequently the said Moore, as payee, endorsed and delivered said notes to plaintiff in error, who instituted action against the defendant in error on the notes alone, alleging in the complaint that the mortgage given to secure the same had no market value, and stating "that the said instrument describing said security will be tendered in court and retransferred to said defendant Eva L. Ricks." (Tr. Record p. 2.)

Defendant in error admitted execution of the notes and mortgage, denied that the security was without value, and alleged its value to be $20,000, and set up two defenses, namely, first, that the notes were without consideration, based upon allegations of fraud practiced by the payee in inducing the execution and delivery of the same; and, second, the failure of the payee of the notes and mortgage, or of plaintiff in error as assignee thereof, to foreclose on the security, as required by Article X, Chapter I, of the California Code of Civil Procedure. (Tr. Record pp. 9-15.)

A trial covering two days was had on the issues thus presented, and at the close thereof a presentation of the cause was made by counsel for each side in argument, and the cause taken by the court under advisement. (Tr. Record, p. 26.) Thereafter the court rendered a decision, making a general finding for and awarding judgment to the defendant in error. (Tr. Record pp. 21-25.)

No exceptions were taken by plaintiff in error to any ruling of the court in the progress of the trial; no special finding requested or made; no declaration asked or rendered on any proposition of law; and no bill of exceptions appears in the record.

Based upon the absence or lack of such exceptions and upon failure of plaintiff in error to request any rulings of the court, defendant in error has moved the court, and herewith renews such motion, either to dismiss the writ of error or to affirm the judgment, which motion is found earlier in this brief, with citations of authorities in support of such motion; and defendant in error, still insisting upon and not waiving the same, will deal with the other portions of the record as presented by the brief of plaintiff in error.

ARGUMENT

Counsel for plaintiff in error is in error in stating in his first specification of error and assuming in his argument that defendant in error contended, and that the court held, that "the court was without jurisdiction to render judgment," or that the California statute "ousted it of jurisdiction."

The cause was entertained by the court, testimony was offered by both sides, and a full trial was had on all the issues. No special demurrer was interposed, no plea in abatement or other plea to

the jurisdiction was made, and upon consideration of the whole cause, upon a general finding for defendant in error, the court made and entered its judgment.

The provisions of the California statute were alleged in the amended answer (Tr. Record p. 14), were denied by the reply (Tr. Record p. 19), and it must be assumed in the absence of any bill of exceptions that the issue of fact thus raised was proved as any other fact. This is further established by the fact that the legal inference, based upon and deduced from such proof, had a controlling effect in inducing the court's finding.

Counsel for plaintiff in error cites authorities in support of the contention he makes, that the "courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends."

There is no question here of the court's jurisdiction or of the fact that the court did proceed to judgment. Defendant in error, no less than plaintiff in error, was a suitor before the court, and counsel can not complain that the redress afforded was to the defendant in error as such suitor instead of to plaintiff in error.

It is obvious from the form, phraseology, contents, venue and mode of execution of the notes and mortgage that they were prepared by counsel versed in the California law. (Tr. Record pp. 3-8.) They were executed by defendant in error and delivered to plaintiff in error in San Francisco. (Tr. Record p. 1.) Each note bears upon it this language: "This note is secured by a mortgage, of even date herewith," and a copy of each note is incorporated in the mortgage instrument. This is as much a part of the notes as any other part importing a promise to pay, and is sufficient in itself to impart notice thereof to plaintiff in error as endorsee and to put him upon inquiry as to the provisions of the law of the place where said notes and mortgage were executed and delivered.

The law of California, at the time of the execution of the notes and mortgage, provided, and still provides, that there can be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage, that is by suit in foreclosure, Article X, Chapter I, of the California Code of Civil Procedure, being as follows:

"Section 726.—Proceedings in Foreclosure Suits. There can be but one action for the recovery of any debt, or the enforcement of any right secured by

mortgage upon real or personal property, which action must be in accordance with this chapter. In such action the court may, by its judgment, direct the sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage; and if it appears from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases in which execution may be issued."

That suit in foreclosure, where security is given for any debt, is imperative, and that there can be no waiver of the security and no suit maintained on the debt alone, have been many times asserted by the Supreme Court of California.

There can likewise be no waiver even though the security may prove valueless.

Barbieri v. Ramelli, 84 Cal. 154; 23 Pac. 1086.

"The debt is secured by mortgage, and, as only one action may be maintained to enforce a debt thus secured (Sec. 726, Code Civ. Proc.) it follows

that the mortgage security must be exhausted before recourse can be had to the bank account or personal responsibility of the debtor."

Gnarini v. Swiss American Bank, 162 Cal. 181; 121 Pac. 726.

In *Hibernia Bank v. Thornton*, 109 Cal. 427; 42 Pac. 447, the defendant and his wife gave a mortgage to the plaintiff on their homestead to secure a note. On the death of the wife, plaintiff failed to present his claim against the estate as required by statute, and the mortgaged property was set aside to the surviving husband. Following *Barbieri v. Ramelli*, *supra*, the court held that where a mortgage on its face purports to secure a note, the mortgagee can not release the security and maintain an action on the note.

Construing a statute of California, which provides that several contracts relating to the same matter, between the same parties, and as parts of one transaction, are to be taken together, the supreme court of that state held that a note and a mortgage given to secure the same, delivered at the same time, must be taken and considered together. The mortgage in question, therefore, is inseparably connected with the notes. Their execution and delivery constituted one transaction. Each

in terms referred to the other. They covered the same subject matter and involved the same parties. They must, therefore, be declared upon together in any suit brought for their enforcement.

Meyer v. Webber, 133 Cal. 681; 65 Pac. 1110.

Plaintiff in error, in taking an assignment of the notes, accepted them charged with the same limitations or restrictions which the law of the place of their execution and delivery cast upon them.

In *Ludlow v. Bingham*, 4 Dallas 47; 1 L. Ed. 736, the supreme court expressed the opinion that the law of the place where the contract is made governs with respect to its negotiability.

The mortgage in the instant case contains a provision for attorney's fees (Tr. Record p. 6), and it is the law of California, as held in *Meyer v. Webber, supra*, that a note secured by mortgage is not negotiable within the law merchant, or within the civil code, when the mortgage provides for attorney's fees in the event of foreclosure. The decision was upon the construction to be given Sections 3086 and 5093 of the Civil Code: "Being inseparably connected with the mortgage, and affected by the conditions contained therein, the note is not negotiable, within the law merchant or civil code." The notes, then, were taken *cum onere*, and

were subject to the same defenses as they would be in the hands of the original payee.

See, also, *Adams v. Seamon*, 7 L. R. A. (Cal.) 224.

Having thus prefatorially laid the foundation for a statement of the question to be reviewed, if aught may be considered reviewable here, it is conceded that the sole inquiry is, does the statute of California become a part of the contract of the parties, and therefore require foreclosure of the security as therein provided?

It is the contention of the defendant in error that it does, and of the plaintiff in error that it does not.

It is a settled rule of law that contracts are entered into with reference to the laws in force at the place of their execution, that such laws inhere therein, and are imported into and become a part of such contracts, unless it is apparent therefrom or stipulated therein that some other place is to be made the place of performance.

The parties here could have stipulated the place of performance or payment in a state other than California, but they did not do so. In such case it will be taken that the law of the place of execution is also the place of performance.

"The presumption is that contract was intended to be performed at the place where it was made. Law of contract is law at place of its origin in the absence of evidence that it was intended to be performed elsewhere."

Speed v .May, 17 Pa. St. 91; 55 Am. Dec. 540.

Tillinghast v. Port Royal Lbr. Co., 22 L. R. A. (S. C.) 49.

"It is legal presumption that contract is to be performed where it is made, unless it specifies a different place.

"Parties to agreement are presumed to know law of place where performance is to be made, and to contract with a view to that law unless it is otherwise expressed in the contract, and this presumption is legal and irrebuttable."

Lewis v. Headley, 36 Ill. 433; 87 Am. Dec. 227.

Allshouse v. Ramsay, 6 Wharton (Pa.) 331; 37 Am. Dec. 417.

"The rule, that the *lex loci contractus* shall govern is derived partly from the presumed consent of the parties, and partly from that law to which both are subject, and to which both for the time being owe obedience. The contract must be governed by such law, and, no other being referred to, it must be the law of the place."

"Law of place where contract is made and to be performed governs not only as to its execution, authentication, and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, satisfaction, or discharge."

May v. Breed, 7 Cushing (Mass.) 15.

The Supreme Court of the United States, in Chief Justice Marshall's day, laid down a like rule in Cox v. the U. S., 6 Peters, 172, in the following language:

"The general rule of law is well settled that the law of the place where the contract is made, and not where the action is brought, is to govern in enforcing and expounding the contract; unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed."

The rule was further stated and confirmed in *Pritchard v. Norton*, 106 U. S. 124; 27 L. Ed. 104, as follows:

"The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Ch. J. Marshall in Wayman v. Southard, 10 Wheat., 48, where he defined it as

a principle of universal law: 'The principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in Robinson v. Bland, 2 Burr., 1077. 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.' And in Lloyd v. Guibert, L. R., 1 Q. B., 120, in the Court of Exchequer Chamber, it was said that 'It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter.' Le Breton v. Miles, 8 Paige 261.

"It is upon this ground that the presumption rests, that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention."

The rule was further stated by the supreme court in the recent case of *Gaston v. Warner*, U. S. Adv. Op. December 1, 1922, p. 16, as follows:

"A contract is to be governed as to its validity and operation, by the law of the place where it was made, in the absence of anything to show that the parties, in making it, had in view any other than such law."

Mr. Justice Holmes, in the case of *Mutual Life Insurance Co. v. Liebing*, another recent case decided in April, 1922, and found in U. S. Adv. Op. under date of July 1st, of that year, in considering a like question, says:

"And although the circumstances may present some temptation to seek a different one (rule) by ingenuity, the constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act."

Where one assumes an obligation at his own domicil, the law of that domicil controls the contract.

Wharton, Conflict of Laws, 2d Ed., Sec. 410.

The principle involved in the rule has been laid down by the courts, and particularly by the Supreme Court of the United States, with so much definiteness as to render a citation of other authorities hardly excusable.

Counsel for plaintiff in error insists, however, that Section 726 of the California Civil Code relates to and furnishes only a method of procedure, and argues that the law of California in the instant case may be evaded by assigning the note to an endorsee in another state and suit in such state

brought thereon, by which method not only the mortgaged property but all other property belonging to the maker of the note may be subjected to its payment; in other words, that the law of the forum enters into and becomes a part of the contract of the parties instead of the law of the place, although at the same time contending that the *lex fori* which he invokes is remedial.

It is the contention of the defendant in error that the right to have the security taken in satisfaction of the notes upon foreclosure, or at least that it first be exhausted before other property should be resorted to, is a substantial right going to the substance of the transaction itself, and belongs to the constitution of the contract. The distinction is well stated in *Scudder vs. Union National Bank*, 91 U. S. 406; 23 L. Ed. 245, as follows:

"Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the laws of the place where the contract is made. Matters connected with its performance are regulated by the laws prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought."

It is equally well settled that the *lex fori* governs as to the form of action, whether law or equity, as

whether it shall be assumpsit, covenant or debt, the process of the court, the parties to the suit, the sufficiency of the pleadings, the rules of evidence, and matters relating to procedure.

Pritchard v. Norton, supra.

Bulkley v. Honold, 19 Howard 390; 15 L. Ed. 663.

Wilcox v. Hunt, 38 U. S. 378; 10 L. Ed. 209.

Hibernian National Bank v. Lacombe, 84 N. Y. 367.

Tillotson v. Tillotson, 34 Conn. 335.

Brinker v. Scheunemann, 43 Ill. App. 659.

"The principle is, that whatever relates merely to the remedy and constitutes part of the procedure, is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself or inhering in it or attached to it, is governed by the law of the contract."

Pritchard v. Norton, supra.

In case of contract, like that at bar, in which the jurisdiction of the court depends upon the citizenship of the parties, and in which a foreign state supplies the applicatory law, the court is bound to adopt and give effect to such foreign law which, by

act and will of the parties, has become part of their agreement, and which, without such adoption, would have no force outside its own territory.

If counsel for plaintiff in error is right in his assertion that the right to sue on the notes alone in a jurisdiction other than that of their origin is absolute as a common law right, and in the statement that "any other view of the matter would prevent citizens of other states from resorting to the federal courts for the enforcement of their claims and limit them to the special mode of relief prescribed by a state," then, following his argument to a conclusion, the *lex loci contractus* never inheres in a contract involving the execution and delivery of promissory notes, and no defense thereto that does not grow out of the law of the forum where suit happens to be brought, can be considered meritorious. And this, despite the fact that the courts with practically unanimity hold that the negotiability or non-negotiability of bills and notes, payment that operates as a full or conditional discharge, the validity or invalidity of a foreign assignment, tender and refusal of payment—all go to the merits, inhere in the instruments, are entertained as meritorious defenses, and must be decided by the *lex loci contractus*. So, if by the law of the

place of a contract, equitable defenses are allowed in favor of the maker of a negotiable instrument, such law becomes a part of the instrument and any subsequent endorsement will not operate to change his rights in regard to the holder. The latter must take it *cum onere.*

Story, Confl. L., Sec. 332.
Evans v. Gray, 12 Mart. (La.) 475.

Plaintiff in error in his brief states that if the law of California pleaded in defense is held to apply, then "The matter of citizenship does not enter into the determination of the point: the creditor and the debtor may both be residents of Washington and the security be taken upon lands in California, yet, upon the construction invoked, the creditor must first exhaust the security in the courts of California," etc.

Replying to this, it may be said that no such construction is invoked, but a directly contrary construction instead. If the creditor and the debtor are both residents of Washington then the law of that state, being the place of execution and of the residence of the parties contracting, governs in any action to enforce recovery. The suit may then be directly upon the note in that state.

It is further stated in the brief that it is not the purpose of the statute to prevent other than the mortgaged property from being levied on in case of deficiency, to which statement defendant in error agrees. But the claim that because a deficiency, in case deficiency exists, may be enforced in either event of suit of foreclosure in California or upon a judgment on the notes alone in Washington, is quite beside the question. Defendant in error has a *right*, founded on the statute, which is the *lex loci*, to claim exemption from execution upon all of her property other than the mortgaged property until the latter is exhausted. As was said in *Barbieri v. Ramelli*, *supra*, in construing the effect of Section 726, "it follows that the mortgaged security must be exhausted before recourse can be had to the bank account or personal responsibility of the debtor."

To the same effect is *Meyer v. Webber*, *supra*, where the court said, "whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until the decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is liability to pay only a deficiency which shall appear on the sheriff's return. The liability is therefore contingent and dependent upon the fact whether upon the sale of the mortgaged premises there shall be a deficiency.

The rule that contracts are to be governed by the law in force at the place of their execution has its exceptions, which may be stated as follows: Contracts that contravene public policy of the forum state, or that are immoral or *malum in se*, or against religion or public rights, or that are intended to promote or reward the commission of crime, to corrupt or evade the due administration of justice, and other contracts which in their nature are founded in moral turpitude. In such cases a discussion about the *lex loci* is nugatory.

Story, Conlf. L., Secs. 38, 244.

Oscanyan v. Winchester, etc., 103 U. S. 261; 26 L. Ed. 539.

The Kensington, 183 U. S. 263; 46 L. Ed. 190.

Smith v. Godfrey, 61 Am. Dec. (N. H.) 617.

Carstens Packing Co. v. S. Pac. Co., 58 Wash. 239.

Plaintiff in error, in support of his contention that the statute of California has only a local procedural relation to foreclosure actions, relies chiefly upon certain cases cited at page seven of his brief, from which he quotes liberally in subsequent pages.

They will be here dealt with and enumerated separately:

1. *Ould v. Stoddard*, 52 Cal. 613:

The Supreme Court of California had before it the question of whether, after the holder of a note secured by a mortgage on California lands had secured judgment in Ohio in a suit on the note alone, which judgment remained unsatisfied, he could come into California and institute another and a separate suit for the foreclosure of the mortgage. It was held that by prosecuting his action upon the note alone he had exhausted his remedy upon both the note and security. The report of the case is silent as to where or in what state the parties either resided or contracted. Since the judgment was a personal judgment against the maker it is fair to presume that both the maker and holder were residents of Ohio, which state may have been the place of execution of the note and mortgage. If so, there could be no question of the holder's right to sue upon the note alone in that state and then waive his security. The report of the case also fails to disclose the defense of the California statute or any defense, and the judgment may have been taken on default of the maker. The question raised here was not passed upon.

2. *Blumberg v. Birch*, 99 Cal. 416:

Here a note was executed and delivered in California and secured by a mortgage on California lands. Foreclosure was had by publication and the holder was permitted to prosecute his remedy for the enforcement of a delinquency resulting from the sale of the security.

3. *Felton v. West*, 102 Cal. 266:

The security was lands in Oregon. The holder of the note and mortgage foreclosed in that state by publication and bid in the property for a part of the judgment. He subsequently brought a personal action in California against the maker of the note for the balance due on the judgment. This he was permitted to do, but the court said, "In bringing his action he was not free to choose between Oregon and California. He had no standing whatever in the courts of California. He was compelled to go to Oregon to bring his action." It is claimed that the statute is held to apply only to actions to recover a debt secured by mortgage upon lands in California.

4. *London, etc., Bank v. Dexter Horton Co.*, 126 Fed. 593 (9th C. C. A.):

The lands covered by the mortgage given to secure the debt were in the state of Washington.

This court held that the law of California (Sec. 726) has no application to a suit to foreclose the mortgage in another state where the property is situated.

5. *Mantle v. Dabney*, 47 Wash. 394:

The note was made in the state of Montana. The security was on lands in California. The action was upon the note in Washington. The Washington supreme court held that a similar statute of Montana to that of California would not operate as a defense to an action upon the note in a Washington court. Neither the law of the place of execution nor the law of the forum in which suit was brought had jurisdiction over the *situs* of the mortgaged property.

None of the foregoing cases involves the issues here and they fall short of establishing the point in support of which they are cited as authorities.

It is submitted that the judgment of the trial court is right and should be affirmed.

Respectfully submitted,

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